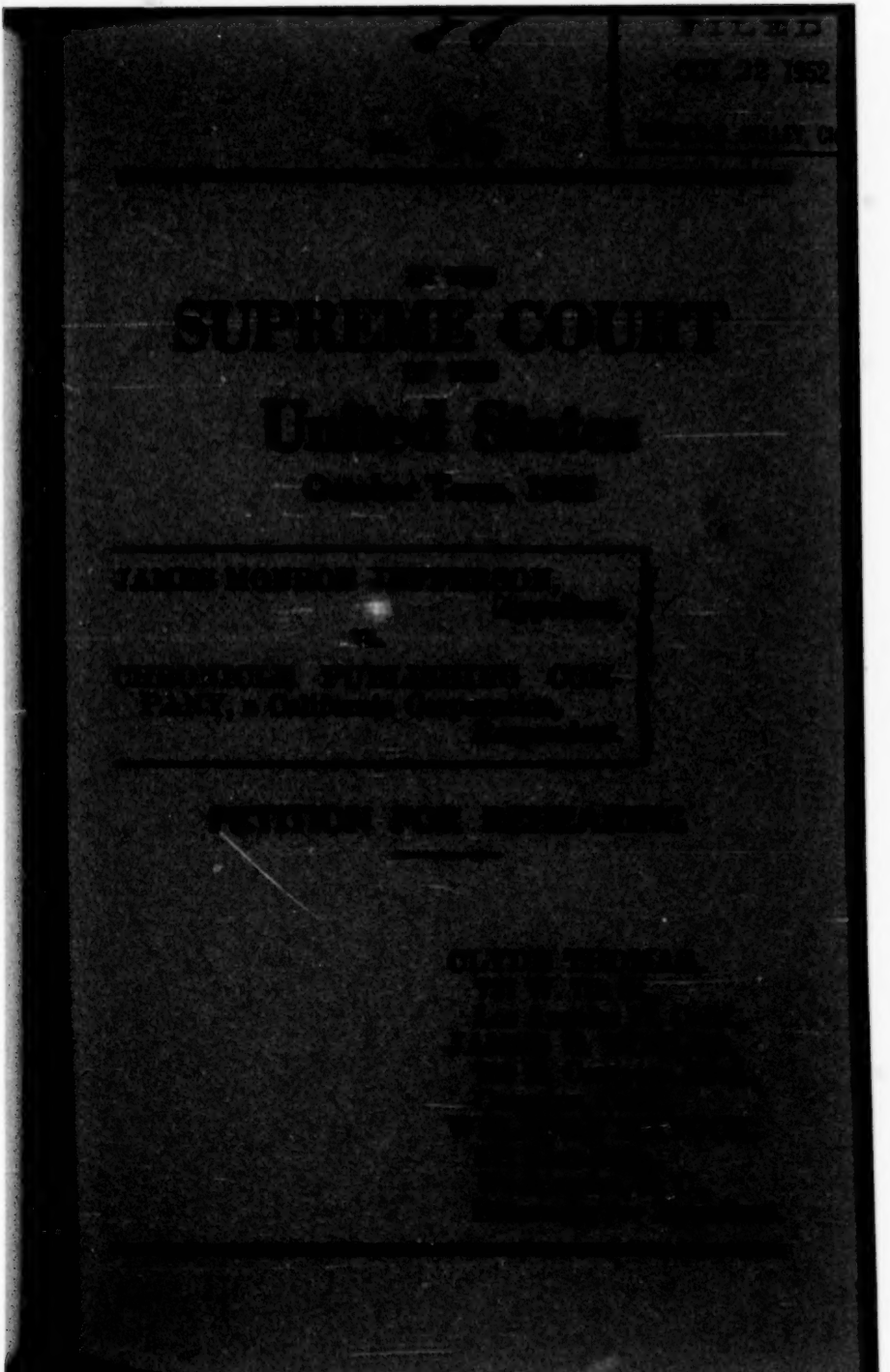

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IN THE

SUPREME COURT

OF THE

United States

October Term, 1952

JAMES MONROE JEFFERSON, *Appellant,* vs. CHRONICLE PUBLISHING COMPANY, a California Corporation, *Respondent.*	No. 96

PETITION FOR REHEARING

The the Honorable, The Supreme Court of the United States of America:

Comes now the appellant and petitions for rehearing of the order granting motion to dismiss and dismissing appeal in the above entitled cause, and as grounds for rehearing says:

It is respectfully submitted that there is and has been at all stages but one question before and decided by the California courts, and that it is a substantial federal question for the reasons that,

1. The present case presents a clear-cut issue on whether a self executing retraction statute is unconstitutional under the 14th Amendment, or whether the victim of a newspaper libel is entitled to a day in court. This question is of great public interest to all the newspapers in California and to all persons who might be libeled in a newspaper. Many other states have passed similar laws and there has been much litigation of their validity.

In this case appellant was denied relief because he failed to comply with section 48a of the California Civil Code, which he claimed to be invalid as being in violation of the 14th Amendment to the United States Constitution. The statute was sustained by the trial court and by the District Court of Appeals on the ground that the California Supreme Court had held the statute not in conflict with the 14th Amendment in the case of *Werner v. Southern California Associated Newspapers,* (35 Cal. (2) 121; 216 Pac. (2) 825.)

The validity of Sec. 48a is the only issue presented at any stage of the proceedings and is the only issue decided by the California courts in this case; holding that Sec. 48a does not violate the 14th Amendment. The result is to deny appellant a day in court to present his case against the newspaper.

Sec. 48a of the California Civil Code provides that no one shall recover more than special damages for libel published in a newspaper unless a correction be demanded and not published. Special damages are

defined as that suffered in respect to property, business, trade, profession or occupation, including money expended as the result of the libel and no other, thus eliminating all general damages resulting from the loss of reputation. This is of utmost importance to all newspapers in California, the practical effect being to eliminate libel actions against newspapers in that state and, in effect, license them to wilfully and purposefully assassinate character and reputation without fear of cost or expense. It is also of extreme importance to anyone about whom a libelous story might be published in a newspaper.

The statute makes no condition as to the good faith, belief, honest mistake or other circumstances which might explain the publication of a libel. It applies not only to firstclass newspaper run with every effort to print only the truth but, to the same extent, to any yellow journal newspaper or any other newspaper that might deliberately and maliciously and knowingly and wantonly libel anyone. In the case now before the court the libel is alleged to be knowingly false and malicious and to have been published through ill will and malice.

Many other states have attempted to change the basic libel laws by providing protection for newspapers if a retraction was published, but in most cases the laws have been held void as contrary to federal and state constitutions. Even when the laws were not held invalid, the statutes were often judicially rewritten so as to allow general damages. (*Reid v. Nichols,* 166 Ky.

423, 179 S. W. 440 (1915); *Ellis v. Brockton Publishing Co.*, 198 Mass. 538, 84 N. E. 1018, 126 Am. St. Rep. 454, 15 Ann. Cas. 83 (1908); *Neafie v. Hoboken Printing & Publishing Co.*, 75 N. J. L. 564, 68 Atl. 146 (1907); *Lindsey v. Evening Journal Assoc.*, 10 N. J. Misc. 1275, 163 Atl. 245 (1932; *Osborn v. Leach*, 135 N. C. 447, 47 S. E. 811, 66 L. R. A. 648 (1904); *Pentuff v. Park*, 194 N. C. 146, 138 S. E. 616, 53 A. L. R. 626, later app. 195 N. C. 609, 143 S. E. 139 (1927); *Meyerle v. Pioneer Publishing Co.*, 45 N. D. 568, 178 N. W. 792 (1920).) Some of the above courts and others have indicated by strong dictum that they would declare unconstitutional any statute attempting to substitute a retraction for general damages. (*Moore v. Stevenson*, 27 Conn. 14 (1858); *Hotnhkiss v. Porter*, 30 Conn. 414 (1862); *Neafie v. Hoboken Printing & Publishing Co., supra; Osborn v. Leach, supra; Meyerle v. Pioneer Publishing Co., supra; Post Publishing Co. v. Butler*, 137 Fed. 723 (C. C. A. 6th, 1905).) Where the intention to eliminate general damages was clear, the following courts had no difficulty in declaring the law unconstitutional. (*Hanson v. Krehbiel*, 68 Kan. 670, 75 Pac. 1041, 64 L. R. A. 790, 104 Am. St. Rep. 422 (1904); *Park v. Detroit Free Press*, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544 (1888), approved in *McGee v. Baumgartner*, 121 Mich. 287, 80 N. W. 21 (1899); *Beyers v. Meridian Printing Co.*, 84 Ohio St. 408, 95 N. E. 917, 38 L. R. A., N. S. 913 (1911).)

It will be noted that in none of the foregoing cases did the retraction statute purport to go as far as Sec. 48a of the California Civil Code and apply to everyone without regard to the wilfullness or maliciousness of the publication. The statutes there considered only attempted to give immunity to the publisher for his retraction when it was shown that the publication was in good faith.

Only two states, California and Minnesota, have upheld retraction statutes, the California court in the *Werner* case to which reference is made above.

The Minnesota statute was declared valid by a divided court in *Allen v. Pioneer-Press Co.*, 40 Minn. 117, 41 N. E. 936, 3 L. R. A. 532, 12 Am. St. Rep. 707 (1889). It must be noted that the plaintiff, by virtue of the statute, could still recover general damages, even if the retraction were published, unless the defendant could show that the libelous publication was made in good faith and under a mistake as to the facts. As to the view of the Minnesota Court it has been said:

> " . . . but they confine the scope of the operation of the statute almost to extinction by holding that the sttaute applies only to cases in which the defendant is not negligent. Since practically all inadvertent libels are at least tinctured by the color of negligence, cases are likely to be submitted to a jury with an instruction that they may find general damages if they find negligence; and the result usually expected . . . is a general damage verdict." (*Morris, Inadvertent Newspa-*

per Libel and Retraction, 32 Ill. L. Rev. 32, 43 (1937).)

It is thus seen that the *Minnesota* case is in no way within the type of law contained in Sec. 48a of the California Civil Code and that, therefore, the decision of the California Supreme Court in the *Werner* case stands alone against the weight of authority in the United States. Although this court noted probable jurisdiction of an appeal of the *Werner* case from the California Supreme Court, the matter was settled before argument and the appeal dismissed. The same issue is now presented to the court in this case and is of paramount importance not only to this appellant but to every newspaper publisher in the United States, particularly newspapers of good repute who do their utmost not to publish any unfair articles, while unscrupulous newspapers for the sake of increasing circulation and sales, will be protected in printing scurrilous defamatory stories about persons in high places.

The question is likewise of the utmost importance to every individual who is or might be libeled, as well as to this appellant. He has been denied a day in court, not only to secure damages for the injury to his reputation, but to protect the reputation itself. The special damage provision is so limited that recovery thereunder would tend to belittle rather than vindicate his good name. (See beginning of Justice Carter's dissent in the *Werner* case, *supra*.)

This court should clarify the constitutional principles applicable to retraction laws.

2. The privilege and immunity granted to a newspaper results in a denial of equal protection of the law to appellant, contrary to and forbidden by the 14th Amendment to the Constitution of the United States.

One constant factor in the consideration of the 14th Amendment as applied to the protection of an individual is that a law shall not grant privileges or immunities nor cast burdens and liabilities upon one person which are not granted to or cast upon others similarly situated. Sec. 48a of the California Civil Code violates that principle in two respects, *first,* as to the privilege granted to a newspaper but denied to other publishers; and, *second,* the denial of protection to a person libeled in a newspaper even though the protection is extended to persons libeled in any other manner.

In the *first* instance a newspaper may deliberately and maliciously publish a knowingly scurrilous libel, and the law says it does not have to pay any damages to the person whose reputation is ruined even though the libel was published deliberately for the purpose of ruining his reputation. The publisher has no responsibility for general damages, whatsoever, unless and until the person whose reputation has been ruined shall demand within 20 days that a correction be printed, and then the only liability of the newspaper is to publish a correction within three weeks thereafter.

On the other hand, if a magazine should copy the article, or even publish a digest of it, the magazine

would be subject to a lawsuit for general damages because of the injury to the reputation of the person libeled. There is no dissimilarity between a newspaper and a magazine to justify the granting of such privilege and immunity to the one for its wilful and wanton acts, while holding the other responsible for its acts even though the publication was not knowingly and wilfully done.

In the *second* case the person libeled is the victim of the improper privilege and immunity granted to the newspaper. One who is so libeled is denied a day in court to show the general damages suffered as a result of the wilful and malicious lie. Instead, he has the responsibility of demanding a retraction. If the demand is not made he has no protection whatsoever. If he makes the demand the newspaper must publish a correction within three weeks. If the correction is published he cannot secure compensation for the injury suffered, and he cannot go to court to test whether the correction was effective to overcome the libel and to prevent its repetition.

On the other hand, a person libeled in a magazine can go into court, show his damages to his reputation and collect for his injuries. Even an innocent mistake on the part of the magazine publisher would not be a defense but could only be shown in mitigation of damages.

The California law clearly discriminates against appellant merely because the tort by which he was injured was published in a newspaper. He is saddled

with the onerous burden of demanding a retraction and accepting its publication in full satisfaction of all damages and injuries he might have suffered to his reputation without regard to the actual facts. Anyone libeled in any other manner is not so burdened but has the full authority of the law and a day in court to secure adequate and just compensation. In short, this appellant lost the right to protect his reputation irretrievably and without compensation solely because of the extraordinary protection which the law gives the newspaper publisher. This paragraph is a free paraphrasing of the language of this court in the case of *Oyama v. State of California,* (332 U. S. 633). See also *Takahashi v. Fish and Game Commission* (334 U. S. 410); *Atchison, T. & S. F. R. R. Co. v. Matthews* (174 U. S. 96); *Yick Wo v. Hopkins* (118 U. S. 373).

As was stated in *Park v. Detroit Free Press Co.,* 72 Mich. 560, 567, 40 N. W. 731, 734, 1 L. R. A. 599, 602, 16 Am. St. Rep. 544, 549 (1888), wherein the Supreme Court of Michigan declared void a statute which denied general damages upon retraction by newspapers who published libel in good faith:

> "It is not competent for the Legislature to give one class of citizens legal exemptions from liability for wrongs not granted to others; and it is not competent to authorize any person, natural or artificial to do wrong to others without answering fully for the wrong. . . . "

The theory of the *Park* case that such retraction legislation is class legislation and, therefore, void as a denial

of equal protection of the law received approval in the concurring opinion in *Osborn v. Leach*, 135 N. C. 447, 457, 47 S. E. 811, 815, 66 L. R. A. 648, 652 (1904). Mr. Justice Douglas there said:

> " . . . I feel constrained to say that, in my opinion, the so-called libel act is unconstitutional, inasmuch as it discriminates between the editor of a newspaper and the ordinary citizens. If I write a letter libeling an editor, that perhaps, at most, 10 people may see, I am subject to pains and penalties from which he is exempted by operation of the statute. Whatever other merits the act may have, I do not think that such discrimination can be sustained under the explicit provision of our Constitution. . . . "

3. Reputation is property with an actual monetary value as well as personal satisfaction. It is entitled to the full legal protection given to life, liberty and property under the United States Constitution. The immunity and privilege granted it by the California law licenses a newspaper to deprive one of his reputation without due process of law.

One's reputation is an intangible asset. It is not a merchantable product in the ordinary sense, nevertheless, its value to an individual is more important to him than tangible property and is the difference between failure and success. With a good reputation one can accomplish things and go places within the limits of his own ability. If he has a bad reputation he can do neither in spite of unbounded abilities and capacities.

Damage to reputation is a valuable property right which has long been recognized in the law of defamation. (California Constitution, Art. I, Sec. 1; *Melvin v. Reid,* 112 Cal. App. 285, 291; *Osborn v. Leach,* 135 N. C. 447, 451, 47 S. E. 811, 813, 66 L. R. A. 648, 651 (1904); *Meyerle v. Pioneer Publishing Co.,* 45 N. D. 568, 574, 178 N. W. 792, 794 (1920), and the many authorities cited therein.) In *Park v. Detroit Free Press,* 72 Mich. 560, 566, 40 N. W. 731, 733, 1 L. R. A. 599, 601, 16 Am. St. Rep. 544, 548 (1888), the Court said:

> "There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization. It is a thing which is more easily injured than restored, and where injury is capable of infinite mischief. . . . "

The inherent intangible nature of reputation means that its value, or the injury to it by a wilful and malicious libel, can only be measured in terms of general damages. Special damages, as defined by the California law, have no commensurate relation to the damage caused by injury to the reputation.

The theory of Section 48a seems to be that if the injured person demands a correction of the libel within 20 days and the newspaper publishes a correction within three weeks after the service of the demand, that then the injured party is restored completely for all damage to his reputation and that no injury has been

suffered by him for which he should be compensated. This conclusion is unsupported by fact or common sense. It is common and general knowledge that newspapers are so widely distributed, read by so many people, and oftentimes sketchily and spasmodically read, that it would be the normal usual event for many persons reading the libel to fail to see the correction. The reader of the correction is much more likely to be impressed by the spectacular lie than he is by the correction. The reader may recognize that the newspaper published the correction to prevent and defeat a lawsuit, and he might conclude that it was published for that purpose without regard to the facts in the original story.

The ultimate result of Sec. 48a is to license a newspaper to freely libel anyone and thereby deprive him of his reputation, that is his rights and property, without due process of law. Even though a deliberate, wilful and malicious lie is published in the newspaper for the purpose of running the victims' reputation, he is nevertheless denied a day in court to secure general damages with the resulting vindication.

4. Sec. 48a does not abolish the cause of action for the tort of libel and does not substitute a new process of law for securing compensation for such an actionable wrong. It recognizes the tort and merely prevents the collection of damages if the specific tort is perpetrated in a certain manner, that is, published in a newspaper.

California law recognizes libel as an actionable tort both in its constitution and its statutes. The California Constitution provides that "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right." (Cal. Constitution, Art. I, Sec. 9.) This broad basic provision is made specific in the California Civil Code, Sec. 43, which provides that " . . . every person has . . . the right of protection from restraint or harm, from personal insult, from defamation, . . . "

The California Civil Code next provides in Sec. 43.5 that "No cause of action arises for:

a) alienation of affection
b) criminal conversation
c) seduction of a person over the age of legal consent
d) breach of promise of marriage."

It also provides in the next section, 43.5a, that there shall be no cause of action for arrest pursuant to warrant regular on its face.

At no time is libel, however published, declared to be a tort for which no cause of action shall arise. The question now before the court is not the right of California to abolish the tort of libel and thereby deprive appellant of a cause of action. The point to be decided is the right of California to deny damages to one who has been injured by a tort of libel merely because of the medium by which the libel was published.

The California law thus provides that anyone libeled in California has a cause of action by which he may sue and recover all damages, including general damages. It then gives special treatment to a libel which is published in a newspaper, the most potent, far-reaching, effective and readily accessible of all publications, and declares that if the libel is published in such medium the victim of the libel shall be denied any rights to general damages, no matter if the very publication was itself designed and intended to ruin the reputation of the victim. Clearly, the cases in which a tort was abolished, the cases in which a different legal process was provided for determining damages, such as the industrial compensation laws, are not pertinent to the law now being considered.

5. The publishing of a correction of the libel story after demand by the victim is not due process of law and does not compensate the victim for his injuries or damages resulting from a libel.

The California law absolutely frees a newspaper publishing libelant from any liability for general damages unless he refuses to publish a correction after demand by the victim. If such demand is not made, as was the case now before this court, the victim is without any recourse whatever and the tort feasor is free from any liability for general damages to the victim, even though his reputation is completely ruined with all the consequential injury to his business or profession. This result comes about from the law itself and not from any judicial or other process of law.

If the victim does make the demand for correction within 20 days and the correction is published within three weeks, the book is closed with no further recourse by any process of law for the victim to secure compensation for his loss of reputation or other general damages that he might have suffered. The results are brought about entirely by the parties with no process of law for determining the sufficiency of the correction to restore the victim's good name to him for the harm done by the wrongful act. There is no judicial or other process of law to which the victim can go for adjustment of his rights or to secure any compensations for the injuries suffered as result of the malicious, deliberate and intentional assassination of his character in a newspaper.

The effect of this law is to license newspapers to deliberately assassinate character and reputation of another person. It even protects assassination of character by the "big lie" and the repetition thereof. The "big lie" not only attracts attention but, by repetition, comes to be accepted as truth even though obviously false on its face to ordinary thinking people. The California law creates a great haven for the perpetration of the "big lie" in newspapers. The "big lie" can be published again and again, and each time a correction is demanded, a correction can be printed. The repeated publication of the corrections as well as the "big lie" itself would further spread the vicious results, and the victim left without any recourse against such deliberate action.

That this is the effect of the California law is made clear in the dissenting opinion of Justice Schauer in the case of *Werner v. Southern California Associated Newspapers* cited above, in which he says:

> "I reiterate that it is only in respect to the licensing, in effect, of deliberately false and malicious publications that this dissent is directed. I cannot think that the great body of reputable newspapers and radio broadcasting companies which serve our country and our people so well would ever stoop to the vicious practices which the statute would permit. But there is nothing to prevent vicious persons from entering the publishing business and from taking full advantage of the law as it is upheld. The reputable publishers themselves may in the long run suffer more

from the nefarious practices which the law permits and which it encourages than they would from defending a few libel actions against the unfounded charge of falsity and malice. Since the majority opinion affirms the judgment on the theory that section 48a is valid in its every element and application I do not discuss whether what I believe to be the invalid portions or applications of the statute could be deleted and the remainder upheld. Likewise, for the purposes of this dissent, I accept the implications of the majority that affirmance of the judgment depends on sustaining the statute in its entirety."

The victim of a libel published in a newspaper is also without day in court vindication of his reputation. While the law allows him to sue for special damages, such damages do not involve his reputation or character and are so limited in provable loss that a judgment for only a nominal amount could be secured. The amount recoverable is woefully disproportionate to the actual damage suffered by one whose reputation has been injured. The result of such a lawsuit and such a judgment would make it appear to the public that the victim had no reputation of any appreciable value, for the public would not distinguish the limitations placed on him by this law. Sec. 48a deprives the victim of a day in court for vindication of his reputation and his good name.

CONCLUSION

A rehearing should be granted as a substantial federal question as presented to the court on this appeal; it is of great public interest to newspapers and to persons who might be the victim of a libel published in a newspaper; appellant and all other persons who are libeled in a newspaper have been deprived of a day in court for the purpose of vindicating their good name and securing compensation for injury thereto; and this court should take jurisdiction for the purpose of determining that the retraction law adopted by California is in violation of the Federal Constitution and therefore void.

Such an encroachment on his rights is eroding the Constitution and the doctrine *principiis obsta* must prevail. We can think of no more appropriate place and time to block the evil of constitutional erosion at its beginning than here.

Granting the respondent's motion to dismiss has closed the door to all individuals to raise this question ever again.

Dated, Los Angeles, California, October ....., 1952.

Respectfully submitted,

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